

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ESTATE OF WILLARD SWORDEN, BY)
AND THROUGH PERSONAL REPRE-)
SENTATIVE, SCOTT SWORDEN, AND)
SCOTT SWORDEN INDIVIDUALLY,)
)
)
Plaintiffs,)
)
)
v.)
)
)
REYNOLDS METALS COMPANY, a)
Delaware corporation, ALCOA)
INC., a Pennsylvania corpor-)
ation, and ESIS, a Pennsyl-)
vania corporation,)
)
)
Defendants.)
)

Peter O. Hansen
LAW OFFICES OF PETER O. HANSEN
620 S.W. Fifth Avenue, Suite 1210
Portland, Oregon 97204-1426

Attorney for Plaintiffs

Michael J. Sandmire
Nathan A. Karman
ATER WYNNE LLP
222 S.W. Columbia, Suite 1800
Portland, Oregon 97201-6618

Attorneys for Defendants Reynolds Metals Company & Alcoa, Inc.

/ / /

1 - OPINION & ORDER

1 Margaret M. Van Valkenburg
2 BULLIVANT HOUSER BAILY PC
3 300 Pioneer Tower
4 888 S.W. Fifth Avenue
5 Portland, Oregon 97204-2078

6 Attorney for Defendant ESIS

7 HUBEL, Magistrate Judge:

8 Plaintiffs Estate of Willard Sworden, by and through Personal
9 Representative Scott Sworden ("the Estate"), and Scott Sworden
10 individually, bring this tort action against defendants Reynolds
11 Metals Company, Alcoa, Inc., and ESIS. Plaintiffs bring claims of
12 fraud, deceit, breach of fiduciary duty, statutory wrongful death,
13 common law wrongful death, and a claim under Oregon's Employer
14 Liability Law.¹

15 All defendants move for summary judgment on the limited issue
16 of workers' compensation exclusivity. All parties have consented
17 to entry of final judgment by a Magistrate Judge in accordance with
18 Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). I grant
19 the motions.

20 BACKGROUND

21 Willard Sworden worked at the Reynolds Metals plant in
22 Troutdale from September 1974 to September 2000. Defendant Alcoa

23 ¹ The caption of the Complaint suggests that plaintiffs
24 bring a separate claim of civil conspiracy, but there is no such
25 claim actually delineated in the body of the Complaint. This is
26 in accord with Oregon law which does not recognize civil
27 conspiracy as an independent tort. Stringer v. Car Data Sys., Inc., 108 Or. App. 523, 528, 816 P.2d 677, 680 (1991), aff'd, 314
28 Or. 576, 841 P.2d 1183 (1992). Rather, it is a "theory of mutual
agency under which the acts of each of the conspirators are
imputed to the other members for purposes of tort liability."
Granewich v. Harding, 150 Or. App. 34, 39, 945 P.2d 1067, 1070
(1997), rev'd in part on other grounds, 329 Or. 47, 57, 985 P.2d
788, 794 (1999).

1 bought the Troutdale Reynolds plant on May 3, 2000. The purchase
2 was in the form of a merger between Reynolds and a wholly-owned
3 subsidiary of Alcoa named RLM Acquisition Corporation. The
4 surviving entity of that merger is Reynolds Metals Company, a
5 wholly-owned subsidiary of Alcoa. From the time of purchase on May
6 3, 2000, until the Troutdale plant shut down permanently in the
7 fall of 2000, Reynolds continued to operate the plant.

8 On or about November 6, 2000, Willard Sworden was diagnosed
9 with bladder cancer. On or about March 5, 2001, Willard Sworden
10 filed a workers' compensation claim for bladder cancer allegedly
11 arising out of his employment at the Troutdale plant, specifically
12 his exposure to coal tar pitch. The initial workers' compensation
13 claim was filed with "Reynolds Metal Co." listed as the employer.
14 Exh. A to Nov. 17, 2004 Van Valkenberg Affid.

15 On April 24, 2001, ESIS, the third-party administrator for the
16 claim, denied Willard Sworden's claim on the basis of insufficient
17 evidence that his employment was the "major contributing cause" of
18 his claimed condition. The denial letter identifies the
19 "Client/Account" as "Reynolds Metals." Exh. B to Nov. 17, 2004 Van
20 Valkenberg Affid. The letter also states that . . . there is
21 insufficient medical evidence that your employment with Reynolds
22 Metals is the major contributing cause of your claimed condition,
23 bladder cancer." Id.

24 On June 19, 2001, Willard Sworden appealed the claim denial,
25 challenging the denial of the compensability of the claim and
26 asserting that the claim should have been accepted. In the Request
27 for Hearing, the employer is identified as "Reynolds Metals." Exh.
28 C to Nov. 17, 2004 Van Valkenberg Affid.

1 A hearing on certain discovery issues involved in the appeal
2 was conducted on September 18, 2001, by Administrative Law Judge
3 (ALJ) Darren Otto. At the hearing, Willard Sworden contended that
4 the major contributing cause of his cancer was workplace exposure
5 to coal tar pitch. ALJ Otto continued the hearing to allow the
6 parties to engage in discovery.

7 During the hearing, an issue was raised regarding whether
8 Willard Sworden had to file a separate claim against Alcoa.
9 Excerpts from that hearing show that the parties to the workers'
10 compensation proceeding agreed to treat the claim against Reynolds
11 as a claim against Alcoa and the April 24, 2001 denial of the claim
12 as having come from both entities, obviating the need for Willard
13 Sworden to file a separate claim against Alcoa. Exh. A to Mar. 7,
14 2005 Frost Affid. at pp. 2-4; Exh. 8 to Apr. 1, 2005 Karman Declr.

15 Discovery in the claim was in progress when Willard Sworden
16 died of bladder cancer on May 27, 2002.

17 In August 2002, Evohl Malagon, an attorney representing Linda
18 Cato, a woman claiming to be Willard Sworden's common-law wife,
19 made a claim for widow's benefits. ESIS questioned Cato's right to
20 receive widow's benefits. Cato's claim was joined in the same
21 proceeding as Willard Sworden's appeal of the denial of his claim.

22 On November 26, 2002, ESIS issued a Notice of Acceptance of
23 Willard Sworden's workers' compensation claim.

24 On January 13, 2003, ESIS paid \$18,288.76 to Kaiser Permanente
25 for Willard Sworden's medical costs and also issued a check to Cato
26 for \$4,825 for reimbursement of Willard Sworden's funeral expenses.

27 On January 20, 2003, plaintiffs' counsel Peter Hansen filed a
28 "Supplemental Request for Hearing," on behalf of the Estate, asking

1 that the November 2002 acceptance of Willard Sworden's claim be set
2 aside. Cato did not join in this request.

3 On February 27, 2003, ALJ Otto dismissed the Estate from the
4 workers' compensation proceeding because the estate of a deceased
5 worker is not entitled to pursue a claim in the event the claimant
6 dies before the final disposition of the claimant's hearing
7 request. ALJ Otto also concluded that Cato was not entitled to
8 widow's benefits because she did not have a living child under the
9 age of eighteen as a result of her relationship with Willard
10 Sworden.

11 The Workers' Compensation Board upheld the ALJ's rulings.
12 Both the Estate and Cato have appealed the Board's rulings to the
13 Oregon Court of Appeals. The appeals are pending. Plaintiff
14 initiated the action in this Court on July 30, 2004.

15 STANDARDS

16 Summary judgment is appropriate if there is no genuine issue
17 of material fact and the moving party is entitled to judgment as a
18 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
19 initial responsibility of informing the court of the basis of its
20 motion, and identifying those portions of "'pleadings, depositions,
21 answers to interrogatories, and admissions on file, together with
22 the affidavits, if any,' which it believes demonstrate the absence
23 of a genuine issue of material fact." Celotex Corp. v. Catrett,
24 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

25 "If the moving party meets its initial burden of showing 'the
26 absence of a material and triable issue of fact,' 'the burden then
27 moves to the opposing party, who must present significant probative
28 evidence tending to support its claim or defense.'" Intel Corp. v.

1 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
2 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
3 Cir. 1987)). The nonmoving party must go beyond the pleadings and
4 designate facts showing an issue for trial. Celotex, 477 U.S. at
5 322-23.

6 The substantive law governing a claim determines whether a
7 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
8 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
9 to the existence of a genuine issue of fact must be resolved
10 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
11 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
12 drawn from the facts in the light most favorable to the nonmoving
13 party. T.W. Elec. Serv., 809 F.2d at 630-31.

14 If the factual context makes the nonmoving party's claim as to
15 the existence of a material issue of fact implausible, that party
16 must come forward with more persuasive evidence to support his
17 claim than would otherwise be necessary. Id.; In re Agricultural
18 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
19 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
20 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

21 DISCUSSION

22 The backdrop for this case is a 2001 Oregon Supreme Court case
23 involving the constitutionality of the workers' compensation
24 exclusivity provision as it applies to denials of occupational
25 disease claims. In Smothers v. Gresham Transfer, Inc., 332 Or. 83,
26 23 P.3d 333 (2001), the plaintiff filed a workers' compensation
27 claim for a lung condition that he contended was caused by his
28 exposure at the workplace to certain chemicals used in a trucking

1 company's truck washing service. The defendant's insurer denied
2 the claim. At a hearing before an ALJ, the issue was whether the
3 plaintiff had a compensable occupational disease. The ALJ upheld
4 the insurer's denial because, the ALJ concluded, the plaintiff had
5 failed to prove that his work exposure was the major contributing
6 cause of his lung disorder. Thereafter, the Workers' Compensation
7 Board affirmed the ALJ's decision. The Oregon Court of Appeals
8 affirmed the Board without opinion.

9 The plaintiff then filed a civil negligence action against the
10 employer. The trial court dismissed the complaint for failure to
11 state a claim, reasoning that Oregon Revised Statute § (O.R.S.)
12 656.018 made workers' compensation law the exclusive remedy for
13 work-related injuries, whether or not a claim is compensable. The
14 Oregon Court of Appeals affirmed. The plaintiff appealed to the
15 Oregon Supreme Court, arguing that he had been denied a remedy for
16 the injuries that he suffered at work in violation of the remedy
17 clause in Article I, section 10 of the Oregon Constitution.

18 On appeal, the plaintiff argued that while he could not prove
19 that the acid fumes and mist to which he was subjected at his
20 workplace were "the major contributing cause" of his lung
21 condition, he nonetheless had been injured at work, the fumes and
22 mist were a cause of that injury, and that the amendments to O.R.S.
23 656.018, making the compensation statutes his exclusive remedy
24 regardless of the compensability of the claim, left him with no
25 remedy for the injuries he had suffered at work in violation of
26 Article I, section 10's remedy clause.

27 The lengthy Supreme Court opinion starts by tracing the
28 history of remedy clauses in state constitutions and then proceeds

1 to examine Oregon's remedy clause and prior Oregon Supreme Court
2 cases interpreting the clause. In setting forth the appropriate
3 analysis for remedy clause claims in general, the court stated:

4 It follows from the foregoing that, in analyzing a
5 claim under the remedy clause, the first question is
6 whether the plaintiff has alleged an injury to one of the
7 absolute rights that Article I, section 10 protects.
8 Stated differently, when the drafters wrote the Oregon
9 Constitution in 1857, did the common law of Oregon
10 recognize a cause of action for the alleged injury? If
the answer to that question is yes, and if the
legislature has abolished the common-law cause of action
for injury to rights that are protected by the remedy
clause, then the second question is whether it has
provided a constitutionally adequate substitute remedy
for the common-law cause of action for that injury.

11 Id. at 124; 23 P.3d at 356-57.

12 The court then turned to the analysis of the facts in
13 Smothers. The court stated that its first task was to determine
14 whether the plaintiff had alleged an injury to one of the rights
15 for which the remedy clause mandates that a remedy be available by
16 due course of law. Id. at 128; 23 P.3d at 359. The court
17 concluded that "in 1857, the common law of Oregon would have
18 recognized that a worker had a cause of action for negligence
19 against his employer for failing to provide a safe workplace and
20 failing to warn of the dangerous conditions to which the worker
21 would be exposed at work." Id. at 131; 23 P.3d at 360. The
22 next question was whether there was a remedial process available to
23 the plaintiff for seeking redress for the injuries that he alleges
24 that he suffered. Id. The court noted that the "major
25 contributing cause" standard used in Oregon workers' compensation
26 claims for occupational diseases, did not exist at common law. Id.
27 at 134; 23 P.3d at 361.

28 Thus, for those workers' compensation claims that are

1 subject to the major contributing cause standard, [i.e.
2 occupational diseases], workers' compensation law does
3 not provide compensation for a work-related incident that
4 was only a contributing cause of the worker's injury.
5 Therefore, workers' compensation law no longer provides
6 a remedy for some wrongs or harms occurring in the
7 workplace for which a common-law negligence cause of
8 action had existed when the drafters wrote the Oregon
9 Constitution in 1857.

10 Id.

11 In summarizing its holding, the court stated:

12 Based on our analysis of the remedy clause of
13 Article I, section 10, we conclude that determining
14 whether the exclusive remedy provisions of ORS 656.018
15 (1995) violate that clause involves a case-by-case
16 analysis. The first inquiry is whether a workers'
17 compensation claim alleges an injury to an "absolute"
18 common-law right that the remedy clause protects. If it
19 does, and the claim is accepted and the worker receives
20 the benefits provided by the workers' compensation
21 statutes, then the worker cannot complain that he or she
22 has been deprived of a remedial process for seeking
23 redress for injury to a right that the remedy clause
24 protects. Neither can the worker complain that he or she
25 has been deprived of a remedial process if a compensation
26 claim is denied because the worker is unable to prove
27 that the work-related incident was a contributing cause
28 of the alleged injury, which is what a plaintiff would
 have had to prove in a common-law cause of action for
 negligence. However, if a workers' compensation claim
 for an alleged injury to a right that is protected by the
 remedy clause is denied because the worker has failed to
 prove that the work-related incident was the major,
 rather than merely a contributing, cause of the injury,
 then the exclusive remedy provisions of ORS 656.018
 (1995) are unconstitutional under the remedy clause,
 because they leave the worker with no process through
 which to seek redress for an injury for which a cause of
 action existed at common law.

29 Id. at 135; 23 P.3d at 362.

30 Following Smothers, the Oregon Legislature adopted O.R.S.
31 656.019(1)(a) which codifies Smother. The statute provides that
32 [a]n injured worker may pursue a civil negligence action
33 for a work-related injury that has been determined to be
34 not compensable because the worker has failed to
35 establish that a work-related incident was the major
36 contributing cause of the worker's injury only after an
37 order determining that the claim is not compensable has

1 become final. The injured worker may appeal the
2 compensability of the claim as provided in ORS 656.298,
3 but may not pursue a civil negligence claim against the
4 employer until the order affirming the denial has become
5 final.

6 O.R.S. 656.019(1)(a).

7 To come within the exception to the workers' compensation
8 exclusive remedy provision articulated in Smothers, and thus, to be
9 able to proceed with tort claims typically precluded by that
10 exclusivity remedy provision, a plaintiff must show that he or she
11 has been denied the statutory remedy which the Legislature has
12 substituted for the common law remedy and that such denial violates
13 the claimant's constitutional rights under the Oregon Constitution.
14 Here, plaintiffs first argue that the November 2002 acceptance of
15 Willard Sworden's workers' compensation claim following its initial
16 denial was wrongful and should be set aside. Following that,
17 plaintiffs contend that a denial of the statutory remedy in Willard
18 Sworden's case violates Oregon's remedy clause.

19 I do not discuss plaintiffs' arguments regarding the propriety
20 of the acceptance of the compensation claim. I conclude that even
21 if the acceptance were somehow wrongful and even if Willard
22 Sworden's claim should have been denied, and assuming that
23 plaintiffs could obtain a final order of denial of the claim,
24 plaintiffs still cannot proceed with the claims asserted here
25 because the claims were not recognized at common law in 1857 and
26 thus, the remedy clause does not guarantee a civil action remedy
27 for such claims. Plaintiffs do not bring a claim for negligently
28 inflicted injury by the employer as in Smothers.

1 / / /

2 / / /

1 I. General Principles of Workers' Compensation Exclusivity
2 and Its Application to the Claims and Parties in this
Case

3 A. General Principles

4 O.R.S. 656.018 provides, in pertinent part:

5 (1) (a) The liability of every employer who satisfies the
6 duty required by ORS 656.017(1) is exclusive and in place
7 of all other liability arising out of injuries, diseases,
8 symptom complexes or similar conditions arising out of
9 and in the course of employment that are sustained by
10 subject workers, the workers' beneficiaries and anyone
11 otherwise entitled to recover damages from the employer
12 on account of such conditions or claims resulting
13 therefrom, specifically including claims for contribution
14 or indemnity asserted by third persons from whom damages
15 are sought on account of such conditions, except as
16 specifically provided otherwise in this chapter.

17 . . .
18 (2) The rights given to a subject worker and the
19 beneficiaries of the subject worker under this chapter
20 for injuries, disease, symptom complexes or similar
21 conditions arising out of and in the course of employment
22 are in lieu of any remedies they might otherwise have for
23 such injuries, diseases, symptom complexes or similar
24 conditions against the worker's employer under ORS
25 654.305 to 654.336 or other laws, common law or statute,
26 except to the extent the worker is expressly given the
27 right under this chapter to bring suit against the
28 employer of the worker for an injury, disease, symptom
complex or similar condition.

29 (3) The exemption from liability given an employer under
30 this section is also extended to the employer's insurer
31 [.] . . .
32 . . .

33 (7) The exclusive remedy provisions and limitation on
34 liability provisions of this chapter apply to all
35 injuries and to diseases, symptom complexes or similar
36 conditions of subject workers arising out of and in the
37 course of employment whether or not they are determined
38 to be compensable under this chapter.

39 O.R.S. 656.018.

40 Generally, "[w]hen the Workers' Compensation Law provides the
41 basis for a compensable injury claim, then that remedy is exclusive

1 and the worker cannot seek a tort remedy instead." Panpat v.
2 Owens-Brockway Glass Container, Inc., 334 Or. 342, 348, 49 P.3d
3 773, 776 (2002). "Conversely, if the injury did not arise out of
4 and in the course of employment, then the exclusivity provision of
5 the Workers' Compensation Law is not a bar to a civil action
6 against an employer for personal injuries." Id.

7 Workers who are injured in the course and scope of
8 employment are entitled to receive certain benefits from
9 their employers, and, with some notable exceptions, those
10 benefits are exclusive of all other remedies that would
11 otherwise be available to the worker. . . . The workers'
12 compensation scheme involves a quid pro quo, in which the
13 employer gives up the right to defend against certain
actions involving workplace injuries, while receiving the
benefit of a limit on potential damages. Conversely, the
employee is compensated for injuries regardless of
whether the employer would be liable in tort, while
giving up the right to pursue other statutory or common-
law remedies.

14 Hanson v. Versarail Sys, Inc., 175 Or. App. 92, 95-96, 28 P.3d 626,
15 627 (2001) (citations omitted).

16 The exclusivity provision applies regardless of whether the
17 injury is ultimately compensable. O.R.S. 656.018(7); Smothers, 332
18 Or. at 88, 23 P.3d at 337 (noting legislative amendment to provide
19 that workers' compensation is the exclusive remedy for work-related
20 injuries, even if a claim is not compensable).

21 B. Parties

22 Under the plain statutory language, employers and workers'
23 compensation insurance carriers are protected by the exclusivity
24 provision. Thus, all defendants may rely on the provision.²

25 Exclusivity expressly applies to "workers' beneficiaries and

27 ² Plaintiffs' separate argument regarding whether Alcoa is
28 an employer is addressed below.

1 anyone else otherwise entitled to recover damages from the employer
2 on account of such conditions or claims resulting therefrom."
3 O.R.S. 656.018(1)(a). Moreover, Oregon courts have applied the
4 exclusive remedy provision to bar claims brought by the family and
5 the estate of an injured worker. See Kilminster v. Day Mgmt Corp.,
6 323 Or. 618, 623-28, 919 P.2d 474, 477-79 (1996) (exclusivity
7 provision applied to bar estate of decedent worker from pursuing
8 statutory negligent wrongful death claim because decedent would
9 have had no claim and statute only conferred derivative rights);
10 Rangel v. Denton Plastics, Inc., 148 Or. App. 328, 335, 939 P.2d
11 644, 647 (1997) (after determining that the plaintiffs could not
12 sustain their claim that the employer deliberately intended to
13 injure the employee, court affirmed trial court's holding that
14 exclusivity provision barred claims brought by decedent's parents
15 and his estate).

16 The exclusivity provision applies as well even when the
17 specific plaintiff in the civil action receives no benefits or
18 recovery under the workers' compensation system as a result of the
19 worker's death. In Leech v. Georgia-Pacific Corp., 259 Or. 161,
20 485 P.2d 1195 (1971), the disabled daughter of a deceased worker
21 brought an action against her father's employer for damages
22 resulting from the father's death in an industrial accident. As an
23 adult child of the deceased worker, the daughter did not qualify,
24 under the workers' compensation statutes in effect at that time, to
25 receive any workers' compensation benefits directly.³

26 The daughter sued for negligence in a civil action. In
27

28 ³ The statute has since been amended.

1 response to the defendant's workers' compensation exclusivity
2 argument, the daughter argued that the exclusivity provision should
3 not apply to her because no statutory workers' compensation
4 benefits were provided on her account. She contended that a
5 dependent who receives no compensation benefits should not be
6 barred from bringing a negligence action.

7 The Supreme Court disagreed. It first noted that the plain
8 language of the statute "indicates . . . that the legislature
9 intended the remedy provided by [workers'] compensation to be
10 exclusive and that complying employers are not subject to
11 negligence actions by persons omitted from the compensation benefit
12 schedules." 259 Or. at 166, 485 P.2d at 1197.

13 Second, the court upheld the constitutionality of the
14 exclusivity provision in the face of the plaintiff's equal
15 protection/"palpably arbitrary" argument. Id. at 167-70, 485 P.2d
16 at 1198-99. The court noted that the "legislature is not
17 constitutionally required to enact laws which operate to solve
18 perfectly every aspect of the problem to which they are directed."
19 Id. at 167, 485 P.2d at 1198. The legislature's decision to
20 provide workers' compensation benefits to certain classes of
21 people, and not to others who may have been dependent on the
22 worker, did not render the exclusivity provision unconstitutional.
23 Id. at 168-67, 485 P.2d at 1198-99.⁴

24 Defendants may properly assert the exclusivity provision and,
25

26 ⁴ The court expressly declined to address the argument that
27 the exclusivity provision as applied to the plaintiff in that
28 case violated Article I, section 10's remedy provision. 259 Or.
at 167 n.3; 485 P.3d at 1198 n.3.

1 subject to plaintiffs' constitutional argument discussed below, the
2 exclusivity provision applies to both the Estate and to Scott
3 Swarden to bar them from pursuing the civil tort claims in this
4 case.

5 C. Claims

6 As noted above, the claims asserted in this case are statutory
7 wrongful death, common law wrongful death, breach of fiduciary
8 duty, fraud, and a claim under the statutory Employer's Liability
9 Law (ELL).

10 Both wrongful death claims and the ELL claim are asserted
11 against Reynolds and Alcoa⁵. The allegations in support of these
12 claims at paragraphs 1-6, 17-25 of the Complaint, make clear that
13 these claims are exactly the types of claims to which the
14 exclusivity of the workers' compensation system applies.
15 Plaintiffs contend that these causes of action arise out of Willard
16 Swarden's alleged workplace exposure to coal tar pitch which led to
17 his bladder cancer and eventual death. Thus, they are barred by
18 O.R.S. 656.018(1)(a).

19 Defendants argue that the exclusivity provision applies to the
20 other claims as well because they concern the handling of a claim.
21 Defendants correctly note that the "arising out of" language
22 extends to the alleged failure to "provide adequate compensation."

24 ⁵ The ELL and statutory wrongful death claims are expressly
25 asserted against only Reynolds and Alcoa. The common law
26 wrongful death claim is not so limited, but it incorporates the
27 allegations made in support of the ELL and statutory wrongful
28 death claims asserted against only those two defendants.
Moreover, the nature of the claim indicates that as with the
statutory wrongful death and the ELL claims, it can be asserted
only against the employer, not the insurance carrier ESIS.

1 Nicholson v. Blachly, 86 Or. App. 645, 649, 740 P.2d 220, 222,
2 rev'd on other grounds, 305 Or. 578, 753 P.2d 955 (1988).

3 Two other cases are relevant to the issue of whether the fraud
4 and breach of fiduciary duty claims are barred by the exclusivity
5 provision. First, in Gordineer v. Bellotti, 100 Or. App. 102, 785
6 P.2d 362 (1990), the plaintiff alleged that his employer had
7 furnished false and perjured testimony and evidence in a workers'
8 compensation hearing at which an overpayment claim was at issue and
9 that, as a result, he suffered a loss of temporary total disability
10 benefits to which he alleged that he was entitled.

11 The court rejected the plaintiff's argument that the wrongs
12 alleged in his action did not arise out of his compensable injury
13 but, rather, were post-injury intentional torts for which he could
14 bring a civil action. Id. at 105, 785 P.2d at 363. Rather, the
15 court explained, plaintiff stated the issue "too narrowly." The
16 question "is not whether the wrongs arose out of his compensable
17 injury or were post-injury, but whether they were matters
18 'concerning a claim,' for which the decision and review provisions
19 of workers' compensation law are exclusive." Id. at 105-06, 785
20 P.2d at 363-64.

21 Given the plaintiff's allegations, the court concluded that
22 the plaintiff alleged "damages that arose directly out of a
23 workers' compensation proceeding in which the amount of
24 compensation was in issue." Id. at 106, 785 P.2d at 364. The
25 court further noted that adding a claim

26 for general and punitive damages in addition to a claim
27 for loss of compensation does not alter the nature of his
28 cause of action. He seeks to overturn a workers' compensation decision, and the trial court was correct in holding that the remedies in the workers' compensation

1 law are exclusive.

2 Id. at 106-07, 785 P.2d at 364.

3 The Gordineer court distinguished the other relevant case,
4 Crosby v. SAIF, 73 Or. App. 372, 699 P.2d 198 (1985). There, the
5 plaintiff alleged that the defendants had conspired to divest him
6 unlawfully of his right to workers' compensation benefits and to
7 terminate him unlawfully. Specifically, the plaintiff alleged that
8 after his on-the-job injury, his employer and SAIF, the employer's
9 workers' compensation insurer, met and agreed that (1) the employer
10 would create a light duty job for the plaintiff so that workers'
11 compensation benefits would no longer be payable to the plaintiff,
12 and (2) that after the plaintiff started his employment in the
13 light duty position, he would be discharged from his employment.
14 Id. at 373, 699 P.2d at 199. The plaintiff brought three claims:
15 civil conspiracy, intentional interference with contract against
16 SAIF, and intentional infliction of emotional distress.

17 The trial court dismissed the claims against the employer on
18 the basis that the plaintiff's sole remedy was under O.R.S. Chapter
19 659, the discrimination laws. The Court of Appeals reversed. The
20 appellate court first noted that under Holien v. Sears, Roebuck &
21 Co., 298 Or. 76, 689 P.2d 1292 (1984), the plaintiff was not
22 precluded from bringing a common law tort claim because of the
23 existence of remedies under O.R.S. Chapter 659. Id. at 374, 699
24 P.2d at 200.

25 Next, the court rejected the argument that plaintiff's claim
26 was limited to one for unlawful termination for having filed a
27 workers' compensation claim under O.R.S. 659.410. Rather, the
28 court explained, the plaintiff did not plead that he was terminated

1 because he filed a claim. He alleged that defendants conspired to
2 divest him unlawfully of his right to workers' compensation
3 benefits and to terminate him. Id. at 375, 699 P.2d at 200.

4 As the Gordineer court noted, there was no issue in Crosby
5 about the exclusivity of the workers' compensation law. Gordineer,
6 100 Or. App. at 106, 785 P.2d at 364. The Gordineer court
7 explained that "SAIF's contention (which we rejected) was that,
8 because the plaintiff's allegations arose out of his termination
9 after he had filed a workers' compensation claim, the remedies for
10 discrimination under ORS chapter 659 were exclusive. More
11 fundamentally, the misconduct alleged in Crosby had nothing to do
12 with the disposition of the plaintiff's compensation claim." Id.

13 Here, the relevant allegations in the Complaint are that
14 defendants or their agents developed a scheme which would deny
15 damages or compensation for Willard Sworden's bladder cancer and
16 eventual death to Willard Sworden's decedent and his estate.
17 Compl. at ¶ 10. Under this alleged scheme to deny Willard Sworden
18 workers' compensation benefits and then to deny his estate the
19 right to bring a civil action for damages, defendant ESIS accepted
20 Willard Sworden's compensation claim after he died. Id. The
21 entering of the notice of claim acceptance was allegedly done for
22 the unlawful purpose of denying Willard Sworden and plaintiffs an
23 adequate remedy for his death from bladder cancer. Id. Defendants
24 have allegedly intentionally and knowingly entered a false notice
25 of claim acceptance to the Estate misrepresenting the Estate's
26 entitlement to workers' compensation benefits under the law and
27 intending that the Estate and the Workers' Compensation Board would
28 rely upon that misrepresentation. Id. at ¶ 15.

1 Based on these allegations, I agree with defendants that the
2 fraud and breach of fiduciary duty claims concern the processing of
3 Willard Sworden's workers' compensation claim because the tort
4 claims are based on the allegation that the acceptance of the claim
5 after his death was wrongful. This is a direct challenge to the
6 processing of the claim. Thus, I agree with defendants that under
7 Gordineer, the claims are subject to the exclusivity provision.

8 Plaintiffs argue that the court should rely on Crosby and the
9 exception to workers' compensation exclusivity for intentional
10 acts. I reject plaintiffs' reliance on Crosby. This case is
11 controlled by Gordineer, not Crosby.

12 In Crosby, there was no question that the plaintiff was
13 entitled to workers' compensation for his injury. The tort claims
14 asserted in the civil action did not relate to the handling of the
15 claim but rather, to the post-claim alleged agreement between the
16 defendants to allegedly deprive the plaintiff of his compensation
17 by means other than processing the claim. Here, in contrast, the
18 basis of plaintiffs' fraud and breach of fiduciary duty claims is
19 that defendants initially conspired to wrongfully deny Willard
20 Sworden's claim while he was alive and then conspired to wrongfully
21 accept the claim after he died. The only way to characterize these
22 claims is that they have everything to do with the disposition of
23 Willard Sworden's workers' compensation claim. Crosby is not
24 controlling.

25 Next, O.R.S. 656.156(2) creates an exception to the
26 exclusivity provision for certain intentional acts by the employer:

27 If injury or death results to a worker from the
28 deliberate intention of the employer of the worker to
produce such injury or death, the worker, the widow,

1 widower, child or dependent of the worker may take under
2 this chapter, and also have cause for action against the
3 employer, as if such statutes had not been passed, for
4 damages over the amount payable under those statutes.

5 O.R.S. 656.156(2).

6 Plaintiffs overstate the exemption from the exclusivity
7 provision. It does not apply to all "intentional torts," but only
8 to those injuries or deaths resulting from the deliberate intent to
9 cause the injury or death. See Kilminster, 323 Or. at 631, 919
10 P.2d at 481 ("deliberate intent" requires the worker to show that
11 the employer had the specific intent to injure the employee); see also Hanson, 175 Or. App. at 97-100, 28 P.3d at 628-30 (plaintiff
12 could not rely on doctrine of respondeat superior to bring a
13 battery claim against the employer under O.R.S. 656.156(2) because
14 the employer did not intend to injure the plaintiff).

15 In this case, the fraud and breach of fiduciary duty claims do
16 not allege that defendants intentionally caused Willard Sworden's
17 bladder cancer and death. Rather, the allegations of intentional
18 conduct relate to the processing of Willard Sworden's workers'
19 compensation claim. This is the same type of allegation that the
20 court in Gordineer held was covered by the exclusivity provision
21 where the court rejected the plaintiff's argument that his post-
22 injury intentional tort claims regarding the employer's alleged
23 false and perjured testimony were "intentional torts" for which he
24 could bring a civil action. Rather, as discussed above, because
25 the civil claims were matters concerning the handling of the
26 workers' compensation claim, O.R.S. 656.018 applied.

27 The workers' compensation exclusivity provision in O.R.S.
28

1 656.018 applies to all of the claims asserted in this case.⁶

2 II. Oregon Constitution - Remedies Provision

3 Article I of the Oregon Constitution is Oregon's Bill of
4 Rights. Smothers, 332 Or. at 91, 23 P.3d at 338. Section 10
5 provides:

6 No court shall be secret, but justice shall be
7 administered, openly and without purchase, completely and
8 without delay, and every man shall have remedy by due
course of law for injury done him in his person,
property, or reputation.

9 Or. Const. Art. I, sec. 10.

10 As explained in Smothers, the phrase "every man" means every
11 person and

12 [u]nlike many provisions in bills of rights, which
13 protect individual rights by prohibiting the legislature
14 from enacting certain laws or prohibiting the government
15 from taking certain actions, the second clause of section
10 protects rights respecting person, property, and
reputation by mandating affirmatively that remedy by due
course of law be available in the event of injury to
those rights.

16 Smother, 332 Or. at 92, 23 P.3d at 339.

17 As explained earlier in this Opinion, Smother sets forth the
18 following remedy clause analysis:

19 in analyzing a claim under the remedy clause, the first
20 question is whether the plaintiff has alleged an injury

22 ⁶ Interestingly, even plaintiffs seem to recognize the
23 validity of this conclusion. Defendants note that in the pending
24 appeals before the Oregon Court of Appeals by petitioners Cato
and the Estate, the petitioners argue that "[w]hether the
25 employer inappropriately accepted the claim is an issue regarding
a right to receive compensation . . . [and is] squarely [a]
matter[] concerning a claim." Exh. 1 to Apr. 1, 2005 Karman
26 Declr. at p. 4. The petitioners further assert that the
"workers' compensation forum is the only place to litigate
27 'matters concerning a claim[]' [and] that the Hearings Division
is the only forum for the estate's claims of employer
28 impropriety." Id. at pp. 4-5.

1 to one of the absolute rights that Article I, section 10
2 protects. Stated differently, when the drafters wrote
3 the Oregon Constitution in 1857, did the common law of
4 Oregon recognize a cause of action for the alleged
5 injury? If the answer to that question is yes, and if
6 the legislature has abolished the common-law cause of
7 action for injury to rights that are protected by the
8 remedy clause, then the second question is whether it has
9 provided a constitutionally adequate substitute remedy
10 for the common-law cause of action for that injury.

11 Id. at 124, 23 P.3d at 356-57.

12 Remedy clause cases after Smothers have adhered to the
13 Smothers analysis. E.g., Jensen v. Whitlow, 334 Or. 412, 417-18,
14 51 P.3d 599, 601-02 (2002) (following methodology adopted in
15 Smothers); Lawson v. Hoke, 190 Or. App. 92, 95-96, 77 P.3d 1160,
16 1162-63 (2003) (same), rev. allowed, 336 Or. 509, 87 P.3d 1136
17 (2004). Under Smothers, the first question in the analysis is
18 whether the common law of Oregon recognized a cause of action for
19 the alleged injuries in 1857.

20 A. Statutory Causes of Action

21 As explained in Smothers, the remedy clause protects "a wrong
22 or harm for which a cause of action existed when the drafters wrote
23 the Oregon Constitution in 1857." Smothers, 332 Or. at 124, 23
24 P.3d at 356; see also Storm v. McClung, 334 Or. 210, 221-23, 47
25 P.3d 476, 481-82 (2002) (noting that Smothers made clear that the
purpose of Article I, section 10 was to protect absolute "common
law" rights and to the extent earlier cases had suggested that
Article I, section 10 protected any recognized cause of action
regardless of whether it existed at common law or was legislatively
created, those cases were in error).

26 It is clear that the protection extends only to common law
27 causes of action. Thus, plaintiffs' statutory wrongful death and
28

1 ELL claims, which are based only on Oregon statutes and not Oregon
2 common law, are not protected by Article I, section 10's guarantee
3 of a remedy. Accordingly, regardless of whether the acceptance of
4 the workers' compensation claim was somehow wrongful, even if
5 plaintiffs had a final order of a denial of that claim, they would
6 be unable to successfully argue that the exclusivity provision of
7 the workers' compensation statutes violates their rights under
8 Article I, section 10.

9 B. Common-law Wrongful Death Claim

10 Plaintiffs contend that as to their common law claim for
11 wrongful death, I should certify the question of whether Oregon
12 recognizes such a claim to the Oregon Supreme Court. There are
13 several problems with this request.

14 First, as defendants note, certification of questions from a
15 federal court to the Oregon Supreme Court is governed by O.R.S.
16 28.200 - O.R.S. 28.255. A federal court may certify a question

17 if there are involved in any proceedings before it
18 questions of law of this state which may be determinative
19 of the cause then pending in the certifying court and as
20 to which it appears to the certifying court there is no
controlling precedent in the decisions of the Supreme
court and the intermediate appellate courts of this
state.

21 O.R.S. 28.200.

22 Under this Court's Local Rule 83.15(a), this Court applies the
23 criteria for certification set forth in Western Helicopter
24 Services, Inc. v. Rogerson Aircraft Corp., 311 Or. 361, 811 P.2d
25 627 (1991). The rule requires the party seeking certification is
26 required to file and serve a motion with a supporting memorandum
27 that complies with the Western Helicopter case. One of the Western
28 Helicopter criteria is that "it must appear to the certifying court

1 that there is no controlling precedent in the decisions of [the
2 Oregon Supreme Court] or the Oregon Court of Appeals." Western
3 Helicopter, 311 Or. at 365, 811 P.2d at 630.

4 Plaintiffs have not met the procedural criteria set forth in
5 L.R. 83.15 because they have not filed a motion seeking
6 certification or analyzing the factors set forth in Western
7 Helicopter.

8 More importantly, even if plaintiffs had complied with the
9 procedural prerequisites, I would decline to endorse certification
10 because there is controlling precedent in the Oregon courts.
11 Plaintiffs rely on Storm for the proposition that the Oregon
12 Supreme Court has acknowledged that Oregon may indeed recognize an
13 action for common law wrongful death, but that the question has not
14 been answered because it has not been directly presented to the
15 Oregon Supreme Court. I disagree with plaintiffs.

16 Oregon appellate courts have held on numerous occasions that
17 there is no action for wrongful death at common law in Oregon and
18 that wrongful death exists only as a statutory cause of action.
19 E.g., Smothers, 332 Or. at 128, 23 P.3d at 358 ("Oregon has no
20 common-law action for wrongful death"); Kilmminster, 323 Or. at 627,
21 929 P.2d at 479 (noting that because Oregon has no common law
22 action for wrongful death, the plaintiffs suffered no legally
23 cognizable injury to their person, property, or reputation); Griest
24 v. Phillips, 322 Or. 281, 294, 906 P.2d 789, 797 (1995) (noting
25 that the right of action for wrongful death in Oregon is statutory
26 and "at common law no remedy by way of a civil action for wrongful
27 death existed[.]" (internal quotation omitted)).

28 Despite these statements in the multiple Oregon Supreme Court

1 opinions, plaintiffs rely on the following language from Storm to
2 argue that the existence of a common-law wrongful death claim is
3 actually undecided in Oregon and thus, provides the basis for
4 certification of the issue by this court to the Oregon Supreme
5 Court:

6 Plaintiff's counsel has presented this court with
7 research that counsel contends establishes that a common-
8 law action for wrongful death is legally cognizable in
9 Oregon's courts and that the Oregon courts should have
acknowledged a common-law action for wrongful death since
Oregon's statehood. FN4 That question, however, is
beside the point in this case.

10 FN4 This court previously has been apprised of the
11 questionable premise underlying the widely held
view that there was no common-law action for
12 wrongful death. The court acknowledged as much
when it addressed the history of wrongful death
actions in Oregon in Goheen v. General Motors
13 Corp., 263 Or. 145, 150-51, 502 P.2d 223 (1972).
In Goheen, the court first pointed out Prosser's
14 criticism of Baker v. Bolton, 1 Camp 493, 170 Eng
Rep 1033 (nisi Prius 1808), the first case to
15 declare that no civil right of action damages for
the death of another could stand:

16 " * * * Lord Ellenborough, whose forte was never
17 common sense, held without citing any authority
that a husband had no action for loss of his wife's
18 services through her death, and declared in broad
terms that "in a civil court the death of a human
19 being could not complained of as an injury."

20 Goheen, 263 Or. at 150-51, 502 P.2d 223.

21 The court then observed:

22 "Meanwhile, the American courts allowed recovery
23 for wrongful death. In 1848, however, the
Massachusetts Supreme Court in Carey v. Berkshire
24 R.R. Co. [55 Mass. 475 (1848)], ignored earlier
decisions by American courts to the contrary and
cited and adopted the rule as stated in Baker v.
25 Bolton. Since then most American courts, including
this court, have adopted the rule holding that
26 there is no common law cause of action for wrongful
death.

27 Id. at 151, 502 P.2d 223 (footnotes omitted).
28

1 To compensate for the lack of a common-law right of
2 action for wrongful death, Lord Campbell's Act was
3 adopted in England, and the states followed suit by
4 adopting similar statutes. Id. at 153, 502 P.2d
5 223. The original Oregon Wrongful Death Act was
6 included in the original Deady Code of 1862. Since
7 at least 1891, this court has adhered to the view
8 that no right of action for wrongful death existed
9 at common law.

10 334 Or. at 222 & n.4, 47 P.3d at 482 & n.4 (brackets in Storm).

11 This dicta discussion by the Oregon Supreme Court in Storm
12 shows that the court is well aware of the argument that its years
13 of holding that there is no common-law cause of action for wrongful
14 death in Oregon may be unsupportable but that, in fact, the court
15 has chosen to adhere to that holding. This discussion does not,
16 contrary to plaintiff's assertion, show that the Oregon Supreme
17 Court has declined to address the issue because it has not been
18 directly before the court. While there was no common-law cause of
19 action at issue in Storm, the court did not suggest that it might
20 change its holding of more than a century if the question were
21 "directly presented."

22 During oral argument, plaintiffs noted that at present, there
23 were cases pending in the Oregon courts raising the issue of the
24 viability of a common law wrongful death claim under Oregon law.
25 In a post-argument memorandum of law, plaintiffs cite to two such
26 cases, one apparently pending before the Oregon Court of Appeals,
27 with oral argument having occurred in March 2005, and the other in
28 which a petition for review has been filed with the Oregon Supreme
Court. Pltfs' Mem. on Or. Common Law at p. 3. Plaintiffs also
cite to a case of Judge King's in which Judge King declined to
conclude that Oregon recognized a common law wrongful death action
and further declined to certify related questions to the Oregon

1 Supreme Court. Id. Plaintiffs indicate that an appeal of Judge
2 King's case is pending before the Ninth Circuit. Id. Plaintiffs
3 also suggest that the issue may be raised in a pending motion to
4 dismiss before Judge Ashmanskas. Id.

5 The problem with plaintiffs' reliance on all of these cases is
6 that none of them is a decision from an Oregon court suggesting
7 that its controlling law regarding common law wrongful death
8 claims, is in doubt. Plaintiffs simply cite to cases where the
9 argument is being made. None of the authorities cited provide a
10 foundation for certification.

11 I decline to grant plaintiffs' request for certification.
12 Following controlling Oregon law, I conclude there is no common law
13 wrongful death claim in Oregon. As such, the workers' compensation
14 exclusive remedy provision does not unconstitutionally deprive
15 plaintiffs of a remedy for such a claim.

16 C. Breach of Fiduciary Duty & Fraud Claims⁷

17 Under the Smothers analysis, the question is whether these
18 claims were recognized as common law actions at the time the Oregon
19 Constitution was adopted. Language in Smothers suggests that a
20 specific inquiry is required. It is not enough to ask whether a
21 claim was generally recognized as a common law action in 1857.
22 Smothers, 332 Or. at 129, 23 P.3d at 359 (after noting that the
23 common law recognized a cause of action for negligence in 1857, the
24 court then went on to state that its "next, more specific inquiry
25 is whether at common law in Oregon in 1857, an employee would have

27 ⁷ Based on the authority cited in footnote one, I do not
28 address the civil conspiracy allegations as a separate claim.

1 had a cause of action against an employer for failure to provide a
2 safe workplace and failure to warn of dangerous working conditions
3 to which the employee would be exposed.").

4 However, it is also important to note that the existence, in
5 1857, of the precise factual scenario presented by the present
6 claim, is not mandatory. In Lawson, the issue was whether the
7 remedy clause protected a common law negligence action for injuries
8 suffered in an automobile accident when automobiles did not exist
9 in 1857. Lawson, 190 Or. App. at 97, 77 P.3d at 1163. The Oregon
10 Court of Appeals noted that "[t]he [Oregon] Supreme Court has never
11 stated how closely a cause of action must resemble one that existed
12 in 1857 in order to be sheltered by Article I, section 10." Id.

13 The court was guided by Oregon Supreme Court cases construing
14 other provisions in Oregon's Bill of Rights, including Article I,
15 section 17's right to a jury trial. Id. In that context the
16 Oregon Supreme Court has held that the right of jury trial was not
17 limited strictly to those cases in existence before the adoption of
18 the Oregon Constitution but that the right extended to "cases of
19 like nature." Id. (internal quotation omitted).

20 Based on these and other cases under the free speech provision
21 in Article I, section 8, the Lawson court reasoned that:

22 Article I, section 8, and Article I, section 17--like
23 Article I, section 10--are original constitutional
24 guarantees contained in the Oregon Bill of Rights. There
25 is no reason to believe that the remedy clause does not,
26 in like manner, safeguard "extensions" that remain true
1857.

27 Id. at 98, 77 P.3d at 1164.
28

1 The basis of plaintiffs' breach of fiduciary duty and fraud
2 claims is that defendants conspired to deprive plaintiffs of their
3 right to bring a common law negligence claim against defendants
4 under Smothers. More particularly, plaintiffs contend that
5 defendants accepted Willard Sworden's workers' compensation claim
6 without sufficient evidence of major contributing cause, thereby
7 preventing plaintiffs from bringing a civil action in court
8 pursuant to Smothers.

9 In terms of the fraud claim, the elements of the claim would
10 be that defendants, knowing that there was insufficient evidence of
11 major contributing cause (or that the evidence of major
12 contributing cause was false), represented to plaintiffs that there
13 was evidence of major contributing cause, plaintiffs relied on that
14 representation to their detriment, and plaintiffs were harmed by
15 the false representation. Oregon common law recognized a claim for
16 fraud in 1857. See Smallwood v. Fisk, 146 Or. App. 695, 702-03,
17 934 P.2d 557, 561 (1997) (discussing history of Oregon fraud claims
18 and referring to recovery of damages for a civil action for fraud
19 in 1864). Under Smothers, that general inquiry is insufficient.
20 Obviously, the precise factual scenario presented by the fraud
21 claim did not exist in 1857 because there was no workers'
22 compensation system at that time and no requirement for proof of
23 major contributing cause; there clearly was no claim for wrongly
24 accepting a workers' compensation claim at the time of the adoption
25 of the Oregon Constitution.

26 Following the analysis in Lawson, the inquiry is whether the
27 fraud claim is an extension of a common law fraud claim apparent in
28 1857 or is a claim of like nature. The analogous claim in 1857

1 would be that an employer falsely admitted its negligence in the
2 face of a negligence claim by an employee for the employee's work-
3 related injury or disease. I conclude that no such fraud claim
4 existed at common law in 1857. No claim for fraud could be based
5 on an allegedly false admission that the employer was a
6 contributing cause of an employee's injury. The only "damage" from
7 such an admission would have been to deprive the employee of a
8 determination of liability by a jury. Negligence defendants have
9 always been free to admit liability and dispute damages only. This
10 is not a sufficient basis for a fraud claim and such a claim would
11 not have been recognized at common law in Oregon in 1857. The same
12 holds true for ESIS which would be viewed as the employer's agent.

13 As to the breach of fiduciary duty claim, assuming that such
14 a claim was generally recognized at common law in 1857, but see
15 Hanggi v. Hartford Fire Insurance Co., 132 Or. App. 601, 608, 889
16 P.2d 365, 369 (1995) (discussing argument that breach of fiduciary
17 duty claims are not torts, but are based upon principles of trust
18 law developed in courts of equity), the claim in this case is that
19 by accepting Willard Sworden's workers' compensation claim, the
20 employer breached a duty of care owed by the employer to the
21 employee. See Georgetown Realty, Inc. v. The Home Ins. Co., 313
22 Or. 97, 111 n.7, 831 P.2d 7, 14 n.7 (1992) (breach of fiduciary
23 duty claim alleges a breach of the duty of care that the law
24 implies from the relationship).

25 As with the fraud claim, because the workers' compensation
26 system did not exist in 1857, this claim is properly viewed as a
27 claim of "like nature" to one alleging that an employer breached
28 its fiduciary duty to its employee when by admitting negligence in

1 a civil action brought by the employee against the employer for a
2 work-related injury or disease. There is no support for a
3 conclusion that the law would have implied a fiduciary relationship
4 between an employee and employer in the context of litigation
5 between the two. No such claim would have been recognized at
6 common law in 1857. The same holds true for ESIS which would be
7 viewed as the employer's agent. Moreover, for both the fraud and
8 breach of fiduciary duty claims, I have assumed that the plaintiff
9 is the actual employee. Because the claims in this case are
10 brought by the employee's estate and adult child, the existence of
11 the claims at common law in 1857 is even more remote.

12 Because neither the fraud nor the breach of fiduciary duty
13 claims would have been recognized at common law in 1857, the
14 deprivation of the right to bring these claims, caused by the
15 application of the workers' compensation exclusive remedy
16 provision, does not violate the remedy provision of Article I,
17 section 10.

18 Given my conclusion that Article I, section 10 does not
19 protect these claims, I need not analyze the second question in the
20 Smothers remedy clause analysis of whether the Oregon Legislature
21 has provided a constitutionally adequate substitute remedy.

22 In sum, the exclusive remedy provision of the workers'
23 compensation laws initially applies to all of the claims brought by
24 these plaintiffs in this action. Assuming for the purposes of this
25 motion that the acceptance of Willard Sworden's claim was somehow
26 in error and that plaintiffs could obtain a final order of denial
27 of the claim, the exclusive remedy provision still prevents them
28 from bringing their tort claims in this case because in 1857, the

1 common law of Oregon did not recognize any of the causes of action
2 plaintiffs bring here for the alleged injury. Thus, the Oregon
3 Legislature's depriving plaintiffs of their right to bring these
4 claims does not violate Article I, section 10 of the Oregon
5 Constitution.

6 III. Issues Regarding Alcoa

7 Plaintiffs argue that even if there is immunity afforded to
8 Reynolds by the exclusivity provision and that such immunity does
9 not violate Article I, section 10, Alcoa is not protected by the
10 exclusivity provision in any event. I reject plaintiffs' argument.

11 The undisputed facts are that at all times Reynolds employed
12 Willard Sworden. Mar. 30, 2005 Declr. of Dale Perdue at ¶ 3. On
13 May 3, 2000, several months before the plant shut down permanently,
14 Alcoa purchased Reynolds. Id. at ¶ 4. As noted in the background
15 section of this Opinion, the purchase was in the form of a merger
16 between Reynolds and a wholly-owned subsidiary of Alcoa named RLM
17 Acquisition Corporation. Id. at ¶¶ 5-7. The surviving entity of
18 that merger is Reynolds Metals Company, a wholly-owned subsidiary
19 of Alcoa. Id. at ¶ 8. From the time of purchase on May 3, 2000,
20 until the Troutdale plant shut down permanently in the fall of
21 2000, Reynolds continued to operate the plant. Id. at ¶ 9.

22 Based on this evidence, I agree with defendants that the
23 record demonstrates that Reynolds alone employed Willard Sworden
24 for the duration of his employment at the Troutdale plant, even
25 after the purchase by Alcoa. Before the merger, he was employed by
26 Reynolds and after the merger, he was employed by Reynolds the
27 subsidiary company, still an entity in its own right.

28 Although there appears to be a split of authority, with no

1 decision from the Oregon courts regarding Oregon law, I follow the
2 authority holding that a subsidiary's exclusive remedy protection
3 applies to the parent corporation unless the parent corporation
4 commits a separate act. E.g., Waste Mgmt, Inc. v. Superior Ct.,
5 119 Cal. App. 4th 105, 113, 13 Cal. Rptr. 3d 910, 916 (2004) (where
6 "a subsidiary corporation has satisfied its obligation to an
7 employee by securing the payment of workers' compensation benefits,
8 the employee cannot hold the parent corporation liable for harm
9 suffered by the employee in the course of employment unless the
10 parent corporation's alleged acts of negligence are separate from
11 those of the subsidiary"); see also Day v. NLO, 811 F. Supp. 1271,
12 1283 (S.D. Ohio 1992) (parent corporation may be liable only if it
13 has taken an affirmative action "apart from its relationship to the
14 subsidiary"); Aragon v. Clover Club Foods Co., 857 P.2d 250, 256
15 (Utah Ct. App. 1993) (when a worker asserts derivative liability,
16 exclusivity applies, otherwise a claimant could "have his cake and
17 eat it too" by getting workers' compensation benefits and the right
18 to sue); but see Woodling v. Garrett Corp., 813 F.2d 543, 551 (2d
19 Cir. 1987) (noting cases where courts have declined to disregard
20 the corporate veil to extend one corporation's workers'
21 compensation immunity to another). Plaintiffs have no viable
22 separate claim against Alcoa.

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1 CONCLUSION

2 Defendants' summary judgment motions (#13, #17) are granted.

3 IT IS SO ORDERED.

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5 Dated this 8th day of June, 2005.

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8 /s/ Dennis James Hubel
Dennis James Hubel
9 United States Magistrate Judge

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